Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6181

CHARLES F. ATWELL, Petitioner, Defendant

v.

FRANK J. KELLEY, Respondent, Plaintiff

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN CORRECTED BRIEF OF CHARLES F. ATWELL AS AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No._____

CHARLES F. ATWELL, Petitioner, Defendant

v.

FRANK J. KELLEY, Respondent, Plaintiff

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

A. OPINIONS OF THE COURTS BELOW

1. On January 18, 1974, the Circuit Court for the County of Ingham, Michigan granted summary judgment for plaintiff Frank J. Kelley, Attorney General of the State of Michigan, the respondent (thereinafter "Kelley"), against defendant Charles F. Atwell, the petitioner herein (hereinafter "Atwell"), ordering

> "(T)hat defendant, Charles F. Atwell, D.C., shall be and hereby is permanently restrained and enjoined from advertising by using in connection with his name the words or letters 'physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T.', or any other letters, words or insignia indicating or implying that he is a physical therapist, or in any other way, orally, in print, by sign, directly or by implication, representing himself as a physical therapist, in publications, including the Yellow Pages issued by the Michigan Bell Telephone directory placed before the public." (Record Appendix, Document 1, page 1.)

Petitioner Atwell took a timely appeal from this order.

2. On February 27, 1975, Division 2 of the Court of Appeals of the State of Michigan affirmed, per Curiam, the Order of the Ingham County Circuit Court.

Court of Appeals, Division 2 - No. 19447
Before: T.M. Burns, P.J., and Holbrook and Kelly, U.J. per curiam.

Defendant is a licensed chiropractor, pursuant to MCLA 338.151 et seq; JSA 14.591 et. seq. He applied for a license under the Physical Therapy Act, MCLA 338-321 et seq: MSA 14.715(1) et seq, but was refused the license. Thus, he is not registered nor licensed as a physical therapist.

The defendant authorized and obtained a listing in the telephone directories of metropolitan Detroit which listed, inter alia, under "Atwell Zone Physiotherapy and FX Massage System": physical therapists; massage-suana baths-whirlpool; baths; chiropractic physicians. The attorney general, considering this listing to be improper, notified the defendant to cease and desist pursuant to provisions of the deceptive advertising act, MCLA 445.801 et seq; MSA 19.853(1) et seq. Proper notice of this was given. Plaintiff, thereafter, commenced the present suit for injunctive relief in the Ingham County Circuit Court. Various prior suits have involved defendant, Michigan Bell Telephone Company and the State Board of Chiropractic Examiners. None of these suits were predicated upon the deceptive advertising act.

Plaintiff moved for summery judgment, which the trial judge granted. The court ordered:

"(T)hat defendant, Charles F. Atwell, D.C., shall be and hereby is permanently restrained and enjoined from advertising by using in connection with his name the words or letters 'physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T.,

L.P.T., P.T.T.', or any other letters, words or insignia indicating or implying that he is a physical therapist, or in any other way, orally, in print, by sign, directly or by implication, representing himself as a physical therapist, in publications, including the Yellow Pages issued by the Michigan Bell Telephone directory placed before the public."

From this determination the defendant appeals. We note that this sincere gentleman has appeared before this bench in propria persona.

We quickly dispense with certain assertions of defendant. US Const, Am V refers to crimes; as such, the provision that no person shall be put twice in jeopardy for life or limb refers to criminal actions and not to the present action, as it is a civil complaint for an injunction. Secondly, the attorney general may maintain an action under statute to enjoin unlawful, deceptive or misleading advertising. MCLA 445.807(1); MSA 19,853(7)(1). Thirdly, MCLA 14.102; MSA 3.212, provides that an action of law may be brought by the attorney general in the Circuit Court in and for the County of Ingham.

MCLA 338.321(a); MSA 14.715(1)(a), provides a definition for "physical therapy" or "physiotherapy". MCLA 338.322; MSA 14.715(2), provides for a state board of physical therapy registration. Thereafter, provisions for registration of physical therapists via examination or without examination are set out. MCLA 338.3261;MSA 14.715(6), and MCLA 338.327; MSA 14.715(7). MCLA 338.335; MSA 14.715(15), provides that a person not registered under the act or whose registration has been suspended, revoked, lapsed or not renewed shall not use in connection with his name the words or letters physical therapist, physiotherapist, registered physiotherapist, licensed physical therapist, or any other letters, words or insignia indicating, or implying that that person is a physical therapist, nor

shall the individual in any other way, orally, in print, by sign, directly or by implication represent himself as a physical therapist.

MCLA 445.801; MSA 19.853(1), provides that it shall be unlawful for any person knowlingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive or misleading, etc.

It is obvious that: (1) defendant was not licensed as a physical therapist and (2) the telephone advertising implied, if not stated, that he or his agents were physical therapists. Thus, a prima facie case has been made. The injunction was properly granted and this Court affirms.

3. Atwell filed a timely application for leave to appeal to the Supreme Court of Michigan.

On July 9, 1975, the Supreme Court of Michigan denied the application for Leave to Appeal without a hearing.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 9th day of July in the year of our Lord one thousand nine hundred and seventy-five.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 9th day of July in the year of our Lord one thousand nine hundred and seventy-five.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER
Associate Justices

CR 14-360

FRANK J. KELLEY,
Attorney General of
the State of Michigan,
Plaintiff-Appellee,

v. 56800

COA: 19447
LC: 71-12824

CHARLES F. ATWELL, D.C.
Defendant-Appellant.

On order of the Court, the application in pro per for leave to appeal is considered, and the same is hereby DENIED, because the appellant has failed to persuade the Court that the questions presented should be reviewed by this Court.

Swainson, J., not participating.

STATE OF MICHIGAN--ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do herby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of July in the year of our Lord 1975.

/s/ Corbin R. Davis, Deputy Clerk

B. JURISDICTIONAL GROUNDS

1. Defendant Atwell petitions this Court for its Writ of Certiorari to the Supreme Court of Michigan to review its Order denying the Application for Leave to Appeal on July 9, 1975 in order that the Summary Judgment of Ingham County, Michigan, Circuit Court of January 18, 1974 may be reviewed and set aside by this Court or the Supreme Court of Michigan.

C. QUESTIONS PRESENTED FOR REVIEW

1. CAN A DEFENDANT BE TRIED A THIRD TIME IN A STATE ACTION IN WHICH HIS LIBERTY TO EARN A LIVING AND HIS PROPERTY RIGHTS HAVE BEEN TWICE PREVIOUSLY IN JEOPARDY RESULTING IN DECISIONS IN HIS FAVOR?

2. DOES A STATE COURT HAVE JURISDICTION OF AN ALLEGED OFFENSE WHICH TOOK PLACE OUTSIDE THAT COURT'S JUDICIAL DISTRICT BOUNDARIES PREVIOUSLY ASCERTAINED BY LAW?

3. IS A STATE LAW CONSTITUTIONAL IF IT PURPORTS TO FORBID THE PRACTICE OR ADVERTISING OF PHYSIOTHERAPY OR PHYSICAL THERAPY OF A CHIROPRACTOR WHO HAS PREVIOUSLY BEEN GRANTED A STILL-VALID LICENSE TO PRACTICE AND ADVERTISE HEALING ARTS INCLUDING PHYSIOTHERAPY OR PHYSICAL THERAPY?

4. CAN A STATE STATUTE GRANT PHYSIOTHERAPISTS A MONOLOPY ON PHYSIOTHERAPY BY PREVENTING CHIROPRACTORS WHO ARE QUALIFIED AND LICENSED TO PRACTICE SEVERAL HEALING ARTS INCLUDING PHYSIOTHERAPY FROM ADVERTISING THAT PART OR ELEMENT OF THEIR HEALING ARTS?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Constitution:

Amendment 5. Provisions concerning Prosecution, Trial and Punishment - Private Property Not to be Taken for Public Use, Without Compensation.

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment 6. Right to Speedy Trial, Witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process of for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 7. Right of Trial by Jury.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

2.

MCLA 338.321, 322; 338.327; 338.328; 338.329; 338.334; 338.335; 338.337; MSA 14.715(1), (2), MCLA 445.801; MSA 19.853(1), (2); and MCLA 445.802.

(Act No. 164 of 1965)

AN ACT to define and regulate the practice of physical therapy; to provide for the examination, licensing and registration of physical therapists; and to provide penalties for violations.

The People of the State of Michigan enact:

338.321 Physical therapy; definitions. (MSA 14-715 (1)(2)(7)(8)(9)(14)(15)(16)(17).

(a) "Physical therapy" or "physiotherapy" means the treatment of any bodily or mental disorder of any person, or the prevention of such disorder, by the use of the physical, chemical and other properties of heat or cold, air, light, water, electricity, sound, massage, mechanical devices and therapeutic exercise, including related rehabilitation procedures. The use of Roentgen rays and radium for diagnostic or therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term physical therapy or physiotherapy.

(b) "Physical therapist" or "physiotherapist" means a person who practices physical therapy under the prescription and direction of a person licensed and registered in the state to practice under Act No. 237

of the Public Acts of 1899, as amended, being sections 338.51 to 338.59, of the Compiled Laws of 1948, or under Act No. 162 of the Public Acts of 1903, as amended, being sections 338.101 to 338.109 of the Compiled Laws of 1948, or under Act No. 115 of the Public Acts of 1915, as amended, being sections 338.301 to 338.308a of the Compiled Laws of 1948, or a person who is licensed and registered to practice medicine and surgery within other states, districts and territories of the United States, and provinces of Canada.

338.322 State board of physical therapy registration; members; number; qualifications; appointment, terms, vacancies. (MSA 14.715(2)

Sec. 2. (1) There is created a state board of physical therapy registration, hereinafter referred to as the "board", to administer the provisions of this act. The board shall consist of 7 members, citizens of the U.S. and residents of the state, composed of 4 physical therapists, who shall have had not less than 5 years of experience in the practice of physical therapy in this state and shall continue to practice physical therapy in this state, and who, except for members of the original board, are registered in the state, 2 persons licensed and registered in this state to practice under Act No. 237 of the Public Acts of 1899, as amended, and 1 person licensed and registered in this state to practice under Act No. 162 of the Public Acts of 1903, as amended.

(2) The governor, with the advice and consent of the senate, shall appoint the members of the board for terms of 3 years. The terms of office of the members first appointed shall begin when they are appointed and qualify and shall continue thereafter for the following periods: 2 members for 1 year; 2 for 2 years; 3 for 3 years, the terms to end June 30 of the respective years. Upon the expiration of such

terms and all terms thereafter the governor shall appoint a successor to the member whose term expires for a term of 3 years. For each of the terms of physical therapists, the Michigan chapter of the American physical therapy association may submit to the governor a list of physical therapists, and the governor may appoint from such a list of persons recommended. The Michigan state medical society may submit a list of 3 persons qualified to serve on the board for each term to be filled by a person licensed and registered in the state to practice under Act No. 237 of the Public Acts of 1899, as amended, and the Michigan association of osteopathic physicians and surgeons may submit a list of 3 persons qualified to serve on the board for each term to be filled by a person licensed and registered in this state to practice under Act No. 162 of the Public Acts of 1903, as amended, and the governor may appoint from such lists.

(3) Vacancies in the board shall be filled by appointment by the governor in like manner for the balance of an expired term, and each member shall serve until his successor is appointed and qualified. No member of the board shall serve more than 2 terms consecutively.

338.327 Registration; without examination, conditions; fee (M.S.A. 14.715(7))

Sec. 7. The board may register as a physical therapist without examination under one of the following conditions:

(a) A person who makes written application for such registration within 6 months after the effective date of this act, who furnishes satisfactory proof that he is at least 20 years of age, of good moral character, has completed a program of physical therapy education in a school approved by the board, has been practicing or has been qualified to practice

physical therapy in this state for 6 months prior to the effective date of this act, and who at the time of making application for registration pays the board a fee of $35.00, no portion of which shall be returned.

(b) A person who furnishes satisfactory proof that he is a physical therapist registered under the laws of another state, commonwealth, province, district, territory or foreign country where requirements for registration are deemed by the board to be equivalent to those improsed by section 5, or has previously passed a qualifying examination for physical therapists which is acceptable to the board, and who at the time of making application for registration pays the board a fee of $35.00, no portion of which shall be returned.

338.328 Registration; practicing physical therapists in hospitals; qualifications; fee. (MSA 14.715(8))

Sec. 8. The board may register as a physical therapist a person who makes written application for registration within 6 months of the effective date of this act, and who, in lieu of completion of a program of physical therapy education in a school approved by the board, furnishes satisfactory proof that he was practicing physical therapy in any duly accredited hospital in this state for at least 10 years prior to the effective date of this act under the prescription and direction of a person licensed and registered in this state to practice under Act No. 237 of the Public Acts of 1899, as amended, under Act No. 162 of the Public Acts of 1903, as amended, or under Act No. 115 of the Public Acts of 1915, as amended, is of good moral character, has obtained a high school education or its equivalent as determined by the board, and who at the time of making application for registration pays the board a fee of $35.00, no portion of which shall be returned.

338.329 Registration; practicing physical therapist under direction of licensed practitioners; qualifications; fee. (MSA 14.715(9))

Sect. 9. The board may register as a physical therapist each person who makes written application for registration within 1 year of the effective date of this act, and who, in lieu of completion of a program of physical therapy education in a school approved by the board, furnishes satisfactory proof that he was practicing physical therapy in this state on and for at least 5 years prior to the effective date of this act under the prescription and direction of a person licensed and registered in this state to practice under Act No. 237 of the Public Acts of 1899, as amended, under Act No. 162 of the Public Acts of 1903, as amended, or under Act No. 115 of the Public Acts of 1915, as amended, is of good moral character, has obtained a high school education or its equivalent as determined by the board and who passes the examination approved and conducted by the board. At the time of making application for registration, the applicant pays the board a fee of $35.00, no portion of which shall be returned.

338.334 Registration; refusal to grant, suspension or revocation; grounds. (MSA 14.715(14))

Sec. 14. The board may refuse to grant registration to any physical therapist or may suspend or revoke the registration of any physical therapist for any of the following grounds:

(a) Obtaining or attempting to obtain registration by fraud or deception.

(b) Having been adjudged mentally incompetent by a court of competent jurisdiction.

(c) Gross negligence in the practice of physical therapy.

(d) Conduct unbecoming a person registered as a physical therapist or detrimental to the best interest of the public.

(e) Conviction of a felony or a crime involving moral turpitude.

(f) Habitual indulgence in the use of narcotics or other habit forming drugs, or excessive indulgence in the use of alcoholic liquors.

(g) Undertaking to practice physical therapy independent of the prescription and direction of a person licensed and registered in this state to practice under Act No. 237 of the Public Acts of 1899, as amended, under Act No. 162 of the Public Acts of 1903, as amended, or under Act No. 115 of the Public Acts of 1915, as amended, or a person who is licensed and registered to practice medicine and surgery within other states, districts and territories of the U.S., and provinces of Canada.

338.335 Violations of act; penalties (MSA 14.715(15))

Sec. 15. A person who is not registered under this act as a physical therapist or whose registration has been suspended or revoked, or whose registration has lapsed and has not been renewed, who uses in connection with his name the words or letters physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T., or any other letters, words or insignia indicating or implying that he is a physical therapist, or who in any other way, orally, in print, by sign, directly or by implication, represents himself as a physical therapist, is guilty of a misdemeanor. The prosecuting attorney may petition the circuit court for an injunction prohibiting violations of this section. This section takes effect 1 year after the effective date of this act.

338.336 Scope of practice; limitation. (MSA 14.715(16))

Sec. 16. A person registered under this act as a physical therapist shall not treat human ailments other than by physical therapy as defined in this act unless duly licensed or registered so to do under the laws of this state.

338.337 Devices or procedures; use by licensed practitions of other professions. (MSA 14.715(17))

Sec. 17. Nothing in this act shall restrict, limit, or prohibit any person the use of devices or procedures included in section 1(a) of this act as preparatory or pertinent to the exclusive practice of the profession for which he is licensed by the state, if he does not represent himself by any title or abbreviation as set forth in section 15.

This act is ordered to take immediate effect.
Approved July 15, 1965.

P.A.1966. No.241, Eff. March 10, 1967

AN ACT to regulate advertising;to provide penalties for violation of this act; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

445.801 Unlawful advertising; untrue, deceptive or misleading statements, misrepresentation of availability of supply

Sec. 1. It shall be unlawful for any person knowingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive or misleading; or to advertise the availability of goods, wares or merchandise so as to misrepresent or unreasonably overstate the available supply in relation to reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.
P.A.1966. No. 241, § 1, Eff. March 10, 1967.

Penal provisions. see § 750.33 et seq.

445.802 Exception; publication in good faith without knowledge.

Sec. 2. The provisions of this act shall not apply to any owner, publisher, printer, agent or employee of a newspaper or other publication periodical, circular

or outdoor advertising or of a radio or television station, who in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement. With respect to the use of a telephone by subscribers or users, the provisions of this act shall not apply to any person, firm or corporation providing telephone service as a public utility.
P.A.1966, No.241, S 2.Eff. March 10, 1967.

E. STATEMENT OF THE FACTS OF THE CASE

1. On November 9, 1959, Atwell, after a hearing on the merits subsequent to proper legal notice to all interested parties, including the State of Michigan, was awarded a permanent injunction against the Chiropractic Licensing Board of the State of Michigan by the Wayne County Circuit Court, enjoining the Board from preventing his advertising as a physiotherapist, in Wayne County, Michigan.

INJUNCTION

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN:

To H.E. McCorckle, Seymour H. Cane and Charles C. Lynch, Michigan State Board of Chiropractic Examiners and to their counselors, attorneys, solicitors and agents and each and every of them, Greeting:

Whereas, it has been represented to us, in the Circuit Court for the County of Wayne, in Chancery, on the part of CHARLES F. ATWELL, Plaintiff, that he has lately exhibited his Bill of Complaint against you and the said H. E. McCorcke, Seymour H. Cane and Charles C. Lynch, Michigan State Board of Chiropractic Examiners, Defendants, to be relieved touching the matter therein complained of, in which bill it is stated amongst other things, that you are combining

and confederating with others to injure the said complainant touching the matters set forth in the said bill and that your actings and doings in the premises are contrary to equity and good conscience; we therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said H. E. McCorkle, Seymour H. Cane and Charles C. Lynch, Michigan State Board of Ciropractic Examiners and the persons under mentioned, and each and every one of you, under penalty of Ten Thousand Dollars to be levied on your lands, goods and chattel, to our use, that you do absolutely desist and refrain from prosecuting or proceeding with any hearing for the purpose of suspending or revoking the chiropractic license of plaintiff on the charges made and as set forth in the exhibits attached to the bill of complaint.

Edward N. Barnard
Plaintiff's Attorney
905-11 Dime Bldg.
Detroit, Michigan

Witness, the Hon. Ira W. Jayne, Presiding Judge, and the seal of said Court, at the Court House, in the City of Detroit, Wayne County, Michigan this 9th day of November, 1959.
Edgar M. Branigin, Clerk
J. Wilson, Deputy Clerk

Injunction is issued on order of Judge Frank B. Ferguson.

2. In 1965, the Michigan state legislature passed, and the Governor of Michigan signed into law, the so-called Physical Therapy Act 164 of 1965, including MCLA 338.321 and 322, MSA 14.715(1) (2), to regulate the practice of "physical therapy", intending thereby to permit all those licensed as Doctors of Chiropractic to continue to provide physical therapy services to their patients without the need to obtain a "Physical Therapist" license, and to permit Doctors of Chiropractic to continue

to advertise all their services.

338.337 Devices or procedures; use by licensed practitioners of other professions. (MSA 14.715(17))

Sec. 17. Nothing in this act shall restrict, limit or prohibit any person the use of devices or procedures included in section 1(a) of this act as preparatory or pertinent to the exclusive practice of the profession for which he is licensed by the state, if he does not represent himself by any title or abbreviation as set forth in section 15.

3. On July 29, 1969, a Mandatory Injunction was issued in favor of Atwell against the Michigan Bell Telephone Company after a hearing on the merits subsequent to proper legal notice to all interested parties, including the State of Michigan, by the Wayne County Circuit Court, requiring the telephone company to accept Atwell's advertisement of his physiotherapy activities in their "Classified" pages.

MANDATORY INJUNCTION

DR. CHARLES F. ATWELL, Plaintiff
v. No. 136703
MICHIGAN BELL TELEPHONE COMPANY, a Michigan corporation.

Defendant

MANDATORY INJUNCTION

At a session of said Court held in the Old County Bldg., City of Detroit, County of Wayne, State of Michigan

Present: HONORABLE Thomas Roumell, Circuit Judge

"On reading and filing the Petition of the Plaintiff herein both parties having appeared in Open Court by their respective counsel, the Court being fully advised

in the premises:

"IT IS ORDERS and ADJUDGED that the Defendant, Michigan Bell Telephone Company, shall be and hereby is Ordered to place the Plaintiff's advertisement in the Detroit Classified Telephone Directory under the heading "Physical Therapist."

"IT IS FURTHER ORDERED and ADJUDGED that this Order shall remain in full force and effect until the further Order of the Court."

THOMAS ROUMELL
Circuit Judge

Approved as to form

A true copy
EDGAR M. BRANIGIN, Clerk

Charles H. Kivett,
Atty. for the Defendant

4. On February 19, 1971, Michigan Attorney General Kelley, ignoring the decrees on the same grounds and law, ordered in Atwell's favor after hearings on the merits with notice to all parties, and ignoring the Sixth Amendment protection of venue or civinage, caused a "Complaint for Injunctive Relief," File No. 12834-C to be brought against Atwell in the Ingham County Circuit Court.

IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

FRANK J. KELLEY, Attorney General of the State of Michigan,
Plaintiff

vs.

CHARLES F. ATWELL, D.C.,
Defendant.

File No. 12824-C

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

NOW COMES FRANK J. KELLEY, Attorney General of the State of Michigan, by Gay S. Hardy, Assistant Attorney General, and for his bill of complaint against the named defendant states as follows:

1. That the defendant, Charles F. Atwell, D.C., is a resident of Detroit, Michigan and operates the Atwell Clinic at 15412 East Warren, Detroit, Michigan.

2. That, while defendant is currently licensed by the Board of Chiropractic Examiners to practice chiropractic in the State of Michigan, he is not registered as a physical therapist under the physical therapy statute, Act 164, PA 1965, and is therefore prohibited by Section 15 of said Act from using in connection with his name the words or letters:

> "physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T., or any other letters, words or insignia indicating or implying that he is a physical therapist, or who in any other way, orally, or in print, by sign, directly or by implication, represents himself as a physical therapist, ..."

3. Plaintiff is informed and believes that defendant has contracted with Michigan Bell Telephone Co., a Michigan corporation, Directory Advertising, 722 Oakman, Detroit, Michigan, for the placement of an advertisement, a copy of which is marked Exhibit "A" attached hereto and made a part hereof, to appear in the April 1971 Yellow Pages of the Michigan Bell Telephone directories for East Detroit, Downriver and Northwest, the aforementioned advertisement to be placed under the heading "Physical Therapists" and reading as follows:

> "Atwell Zone Physiotherapy & Massage System
> 15412 E. Warren, Detroit
> Baths, Chiropractic Physicians
> Massage, Excellent results in nervous conditions - backache - prostitis - etc. also massage - sauna baths - whirlpool baths - physical therapists -

Excellent results in nervous conditions - backache - prostitis - etc. also massage - sauna baths - whirlpool baths"

Plaintiff is informed and believes that defendant has contracted with Michigan Bell Telephone Company, a Michigan corporation, Directory Advertising, 722 Oakman, Detroit, Michigan for the placement of an advertisement, a copy of which is marked Exhibit "B" attached hereto and made a part hereof, to appear in the April 1971 Yellow Pages of the Michigan Bell Telephone directories for North Woodward and West Detroit the aforementioned advertisement to be placed under the heading "Physical Therapists" and reading as follows:

"Atwell Zone Physiotherapy * Massage System
154 E. Warren, Detroit

Physical therapists - excellent results in nervous conditions - backache - prostitis - etc. Also massage - sauna baths - whirlpool baths - massage - Excellent results in nervous conditions- backache - prostitis - etc. Also massage - sauna baths - whirlpool baths - Chiropractic physicians - Baths"

5. Plaintiff is informed and believes that defendant has contracted with Michigan Bell Telephone Co., a Michigan corporation, Directory Advertising, 722 Oakman, Detroit, Michigan for the placement of an advertisement, a copy of which is marked Exhibit "C" attached hereto and made a part hereof, to appear in the April 1971 Yellow Pages of the Michigan Bell Telephone directory for Pontiac, the aforementioned advertisement to be placed under the heading "Physical Therapists" and reading as follows:

"Atwell Zone Physiotherapy & Fx Massage System
15412 E. Warren, Detroit

Physical therapists - massage - Chiropractic physicians."

6. That the advertisements and listings published

in the yellow pages of the aforementioned Michigan Bell telephone directories, being East Detroit, Downriver, Northwest, North Woodward, West Detroit and Pontiac, are placed before the public and widely circulated in their respective areas.

7. That the listing of defendant's services in the yellow pages under the classified heading "Physical Therapists" and the use of the words "physical therapist" in connection with defendant's name is deceptive and misleading, in that it implies that defendant is registered as a physical therapist under Act 164, supra, and thereby authorized to use the words "physical therapist".

8. That defendant's use of the term "physiotherapy System" within the phrase, "Atwell Zone Physiotherapy & Massage System" is deceptive and misleading in that it implies defendant is registered under Act 164 and thereby authorized to use the term "physiotherapy" in connection with his name.

9. That plaintiff, pursuant to Section 7(2) of Act 241, PA 1966, the deceptive advertising statute, personally served on defendant Charles F. Atwell on Febr. 17, 1971 at 12:30 p.m. a cease and desist order, a copy of which is marked Exhibit "D" attached hereto and made a part hereof, requesting that said defendant take positive action to cease and desist from engaging in deceptive advertising by implying through the use of the words "physical therapist" and "physiotherapy" in connection with his name that he is a registered physical therapist.

10. That defendant, following receipt of Exhibit "D", the cease and desist order served upon him on Febr. 17, 1971 has failed to take positive action, and plaintiff is informed and believes that defendant does not intend to take positive action to cease and desist violating the provisions of the deceptive advertising statute as alleged herein."

A temporary restraining order was issued

against Atwell, who had not received adequate notice and who was unable to obtain adequate competent counsel to defend his liberties and rights in a jurisdiction one hundred miles from his home District, where the allegedly-offensive advertising was distributed in a telephone "Yellow Pages." The actions of Kelley tended to deny Atwell the basic right to earn his living by practicing and advertising his profession of physiotherapy and other elements of chiropractic, which elements Atwell had been practicing and advertising legally as a dully-licensed and qualified chiropractic practitioner since 1940.

11. Atwell was unable to obtain competent diligent counsel to defend his liberty and property rights to advertise and practice the challenged elements of his profession by raising the questions of the rights to trial by jury in defense of his liberty and property rights, the right to be tried in the "district previously ascertained by law," and the right to be free of double jeopardy (in this case, triple jeopardy). As outlined above in Section A. Opinion of the Courts Below, Petitioner Defendant Atwell lost in the Circuit Court of Ingham County, appealed to the Michigan Court of Appeals, raising each of these Constitutional questions in the appeal, was turned down, and then was denied his Application for Leave to Appeal in the Michigan Supreme Court, although he had raised the Constitutional questions in his Application for Leave to Appeal.

F. ARGUMENT

1. Can a defendant be tried a third time in a state action in which his liberty to earn a living and his property rights have been twice previously in jeopardy resulting in decisions in his favor?

In 1959, Atwell first defended, successfully, his right to advertise his services as a physiotherapist or physical therapist. In 1965, the state law concerning

physiotherapy and physical therapists went into effect, with no intention of depriving all chiropractors of the right to practice an element or part of their healing art, physical therapy or physiotherapy. In 1969, Atwell's right to advertise and practice physiotherapy was again vindicated, in Wayne County. His liberty to earn a living (Snaidach v. Family Finance, 89 S.Ct. 1822) and property rights in advertising by sign and in the telephone "Classified" are now in jeopardy for a third time, violating his Fifth Amendment right against being put "twice in jeopardy." The double jeopardy prohibition represents a fundamental ideal in constitutional heritage and it applied to the states through Amendment 14, overruling Palko v. Connecticut, 202 U.S. 319. Benton v. Maryland, 395 U.S. 784. This has frequently been required to uphold the protection against double jeopardy from invasion of state courts, as shown in the following decisions:

Ex parte Lange, NY, 1874, 85 US 170, 18 Wall. 1970
Gore v. US App. D.C. 1958, 78 S.Ct. 1280
Ashe v. Swenson, Mo. 1970, 90 S.Ct. 1189, 397 US 436
Green v. U.S., 355 US 184
Price v. Georgia, 398 US 323
North Carolina v. Pearce, 395 US 711
Morgan v. Devine, 237 US 623

2. It is obvious, since respondent plaintiff Kelley, the Michigan State Attorney General, chose to have Atwell tried over 100 miles from Wayne County, the locus of the allegedly-offensive sign and the Yellow Pages distriction by the telephone company, that he did not want Atwell tried where Atwell had prevailed twice before. (Perhaps Atwell's previous successes in Wayne County caused Attorney General Kelley to file a complaint in Ingham County.) Such "shopping for a favorable jurisdiction" may be acceptable in Michigan law, but it is contrary to the Constitution of the United States, and herefore the Michigan law permitting the state Attorney General to put his defendants in such great expense and

and inconvenience should be declared unconstitutional. Travis v. US 364, US 631, 81 S.Ct.358. The provision for trial in the vicinity of the crime is a safeguard against unfairness and hardship involved when accused is prosecuted in a remote place. Platt v. Minnesota Min.& Mfg.Co., 84 St.Ct.769,376 US 240. Variation from the rule fixing situs of trial in vicinage of the crime for the convenience of the prosecution is not justified. Johnston v. US, 351 US 215, 76 S.Ct.739.

3. Is a State Law Constitutional if it Purports to Forbid the Practice or Advertising of Physiotherapy or Physical Therapy of a Chircpractor who has Previously Been Granted a Still-Valid License to Practice and Advertise Healing Arts Including Physiotherapy or Physical Therapy?

In the Slaughterhouse cases, 83 US 36, 16 Wall. 36, 16 Wall. 36. this Court forbade the imposing of costs or penalties on one segment of the population's business while not limiting another's. In the instant case, Atwell, and other properly-qualified chiropractors, should be allowed to practice and advertise all elements of their profession, and not be prohibited from practicing one element to benefit another profession, or subprofessionals who are unqualified to practice all of the elements of chiropractic healing arts.

If chiropractors are not permitted to practice an element of their profession or healing art which they have been previously allowed to practice, and "physical therapists" are allowed to practice by virtue of a "grandfather clause" in the legislation providing for licensing of "physical therapists" but no "grandfather clause" is provided for chiropractors, then the previously-practicing physical therapists have been granted a monopoly as compared to the previously-practicing chiropractors in hysical therapy, and that is a violation of the Sherman and Clayton Anti-Trust Acts (Title 15, US Code).

"Physiotherapy" is but an adjunct or part of the chiropractic treatments permitted by law. The law anticipates changes in all fields of medical treatment, and, as long as a chiropractor does not (1) perform operative surgery, or (2) prescribes a drug or medicine from material medica, he may take advantage of, for his patients, the new scientific findings with respect to the processes of the human body which necessarily must be taken into consideration by a practicing doctor. As was said by the California Supreme Court:

> "It is true that chiropractic is not a static system of healing and that it may advance and change in techniques, teaching, learning, and mode of treatment within the limits of chiropractic... "Crees v. Calif. State Board Medical Examiners, 28 Ca.Rptr.621 (2 Dist.,Div.2, Cal., 1963)."

Michigan statutes require annual attendance of two-day continuing education seminars as a prerequisite to annual license renewal. Mich.Stat.Ann.§ 338.154. If chiropractic science were static then the legislaturs would not have enacted these statutes. The "continuing education act" is a clear and objective manifestation of legislative intent that chiropractic is a continuously evolving health science which must remain current in its approach to the public's health needs.

Unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The Legislature "cannot forbid one man to practice a calling or profession for the benefit or profit of another." 46 N.W.at 402-403. When it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M.D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the Constitution." 46 N.E.at 403.

In State Board of Medical Examiner's v. Smith, 337 P.2d 938 (Idaho, 1959) the Supreme Court of Idaho held that a naturopath was free to practice naturopath was free to practice natuopathy even though there is no act licensing naturopathy in Idaho. The State Board of Medical Examiners contended, as one might guess, that the practice of medicine and surgery includes every aspect of each and every branch of the entire healing art "except those separately licensed" such as chiropractic and osteopathy.

The Court said: "The right to follow a recognized occupation is a right protected by the constitutional guarantees of liberty. 14th Amendment, Idaho Constitution, Art. I, Sec. 13; Berry v. Summers, 76 Idaho 446, 283 P.2d 1093," and "if the naturopath is limited in his practice to use of a system of physical culture and drugless treatment by methods supposed to stimulate or assist nature, or to the use of physical forces such as air, light, water, heat, massage, and other similar simple materi-medica, the system cannot be inherently injurious or have a tendency in that direction". 337 P. 2d at 941-942.

In People v. Schaeffer, 142 N.E.248 (Ill., 1924) the Supreme Court of Illinois held "we are only concerned with the question whether this act is unconstitutional by reason of unlawful discrimination as charged. As we have previously said in other cases, we have no leading for or against either system or either practitioner. It has been demonstrated over and over again that there is merit in both systems, and neither should be unjustly penalized by statues which permit unlawful discrimination. This statute is in contravention of the 14th Amendment of the federal Constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without the process

of law, nor deny to any person within its jurisdiction the equal protection of the law. It also violates the provisions of our Bill of Rights (Article 2, S2) that no person shall be deprived of life, liberty or property without the process of law, and that no law impairing the obligation of contracts or making any irrevocable grant of special privileges or immunities shall be passed (Article 2, S 14.)" At 251.

The Court declared the statute unconstitutional and furthermore, like the Supreme Court of North Carolina, denounced the concept of granting an irrevocable and prospective monopoly to a given class. This becomes particularly onerous when one is concerned with yet undiscovered and new therapeutic techniques. If a new method of therapeutic device is discovered which does not require surgical skill and doesn't require knowledge of pharmacology, can it constitutionally become the sole property of the medical practitioner and to the exclusion of doctors of osteopathy and chiropractic. The only way a doctor of chiropractic or osteopathy could use a new procedure would be to attempt to gain admission to a medical college, attend for four additional years of college, do an internship, and take a licensing exam. Then he could use the new method which may not have involved surgical skill in the first instance and which he may have been perfectly competent to use at the outset."

4. Is Defendant Atwell Entitled to a Trial by Jury in Defense of his Liberty and/or Property Rights to Advertise Physiotherapy?

The 6th Amendment of the U.S. Constituion provides for trial by jury in defense of liberty or property in criminal matters. The 7th Amendment provides for trial by jury in civil matters involving over $20 in value. In this case, the sign Dr. Atwell displays, and the advertising he has been placing in the

Michigan Bell Telephone Classified pages are each worth far more than $20. The sign cost $600. The advertising costs $200 per year, on the average. These are material property rights that Dr. Atwell should not lose for his alleged offense or violation of law except by trial by jury.

5. Can a State Statute Grant Physiotherapists a Monopoly on Physiotherapy by preventing Chiropractors who are Qualified and Licensed to Practice Several Healing Arts Including Physiotherapy from Advertising that Part or Element of their Healing Arts?

In Yick Wo v. Hopkins, 118 US 356, this Court ruled that a municipal ordinance which might be fair on its face, but enforced, "with a heavy hand and an evil eye" against one segment of a trade or profession, was unconstitutional. Here a monopoly in physical therapy is granted, not to Irishmen injuring Americans on Chinese lineage, but to physical therapists who are qualified only for physical therapy, injuring chiropractors who have been qualified to practice many healing arts, including physical therapy, by the absence of a "grandfather clause" protecting the chiropractors.

6. Prior to the passing of Act 164 of 1965 M.C.L.A. 338.321, 322; MSA 14.715(1), (2), Charles F. Atwell and several other people who opposed these bills had a request in opposition with the chairman of States Affairs Rep. Fitzpatrick on H.B.2108 and also a request with the chairman of the Senate, Senator Romano, on S.B. 36. These requests were ignored and those in opposition did not receive the opportunity to present the legislators the pitfalls of this bill before they passed it.

7. Physical therapy is an active treatment, physiotherapy is a passive treatment. They are two different words and two different professions.

8. The Act 164 of 1965 was sponsored by the A.M.A. or members of this group and is designed to eliminate physiotherapy treatments and physiotherapists. The Act 164 of 1965 is controlled by the A.M.A. and is in their interest only.

9. Physiotherapy was used and developed by chiropractors for more than 75 years.

10. Physiotherapy is not used by physical therapists under the AMA, as developed by the chiropractors.

11. This Act 164 of 1965 deprives the public of the benefits of physiotherapy treatments, which was public domain for 75 years, it also tends to deprive the chiropractors to advertise physiotherapy treatments in violation of our first Amendment. Freedom of speech and Freedom of the Press.

12. Discrimination, which is forbidden in our Constitution, and this Court, has rendered its opinion in Yick Wo v. Hopkins, 118 US 356 and in the Slaughterhouse Cases, 83.W.S36, 16 Wall.

13. Act 164 of 1965 is not in the public interest and therefore for this reason alone would be invalid.

FRANK J. KELLEY HAS FAILED TO DO HIS DUTY

14. He has failed or refused to give an Attorney General's opinion of Act 164 of 1965.

15. He has failed to protect the interest of the public by attacking a 68 year old chiropractor. Why? Who is working in the interest of the public? It seems that Attorney General Frank J. Kelley is working in the interest of big business instead of the interest of the very people who elected him. For we find in Crunch, pg. 137; Marburry v. Madison, 1803, the Supreme Court says: "It is empathically the duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expend and

interpret the rule. If two laws conflict with each other, the court must decide on the operation of each.

"If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply."

16. I, Charles F. Atwell, used physiotherapy treatments and advertised myself as a physiotherapist, also using the letters P.T. from 1938 to 1965. Since Act 164 of 1965 was passed, I have not violated the law. The only violation is that the court ordered my ad placed under physical therapist section of the Michigan Bell Telephone Company because there was no listing for my system, "Atwell's Zone, Physiotherapy and Massage System".

17. There is no Grandfather Clause in Act 164 of 1965, the so-called physical therapy act. Atwell was informed by many legislators that were assured by the AMA that there was a grandfather clause in this act and the approximately 400 people practicing physiotherapy would receive a physiotherapy license. To date, I know not one outside the Allopath system who has received a physical therapy license.

18. March 29, 1967

To Whom It May Concern:

I, Bernard F. O'Brien, Jr., former State Senator of the 5th Senatorial District of Michigan, hereby state that it was my contention during my term of office pertaining to a bill that was passed by the Michigan State Senate in reference to physiotherapy. The said bill encompassed a Grandfather Clause which would allow therapists to be licensed and continue in their present capacity.

Respectfully,
/s/ Senator Bernard F.
O'Brien, Jr.

19. Atwell filed with the physical therapy board on July 27, 1966 for a license under a grandfather clause and was refused as per letter:

State of Michigan
Department of Licensing and Regulation
Board of Physical Therapy Registration
110 Stevens T. Mason Bldg.,
Lansing, MI 48926

August 8, 1966

"Dear Mr. Atwell:

The Board has reviewed your application for physical therapy registration.

We see no way in which you can qualify for licensure by waiver of the examination under the Grandfather Clause, inasmuch as you have not been employed in an accredited hospital in this State as required under Sec. 8, Act 164 of Public Acts of 1965, as amended.

You could, however, upon completion of the enclosed Form #4, "Certificate of Physical Therapy Practice", qualify for the examination under Section 9 of the Act.

We are also enclosing a copy of Act 164, Public Acts of 1965, as amended, which we trust will clarify the situation for you.

For the Board of Physical Therapy
Registration,
H.J. Bradshaw, Deputy Director,
Bureau of Licensing."

Two Lower Court judges have stated, in their personal opinion, Act 164 of 1965 was invalid and may be unconstitutional, and one ordered a Declaratory judgment proceedings.

CONCLUSION

This Court should grant the petition for certiorari, and review the refusal of the Michigan Supreme Court to consider the appeal of Atwell from the judgment limit-

ing his liberty to practice an element of his profession.

Respectfully submitted,

Charles Atwell PRO PER

Charles Atwell, pro per

AFFIDAVIT OF VERIFICATION SS

I, Charles F. Atwell, first being duly sworn, herewith depose and state that I have read the above petition and that all the statements therein are true, to the best of my information, knowledge and belief.

Dated: October 20TH, 1975

Charles F. Atwell

CHARLES F. ATWELL

Sworn to and Subscribed before me, this 20TH day of October 1975.

My Commission expires OCT. 14TH 1976

Geo E Argo Notary Public.

Wayne County, Michigan

GEO. E. ARGO
Notary Public, Wayne Coun[illegible]
My Commission Expires [illegible]

CERTIFICATE OF SERVICE

I certify that I have mailed, first class postage pre-paid, three copies of the enclosed petition for writ of certiorari to Respondent Plaintiff Frank J Kelley, Attorney General of Michigan, this date, October 21, 1975.

Charles Atwell

Charles Atwell

Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-618

CHARLES F. ATWELL,

Petitioner-Defendant,

v

FRANK J. KELLEY,

Respondent-Plaintiff.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WAS PETITIONER-DEFENDANT PLACED TWICE IN JEOPARDY BY THE ACTION OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN TO ENJOIN PETITIONER-DEFENDANT'S DECEPTIVE ADVERTISING?

II.

HAS PETITIONER-DEFENDANT THROUGH HIS ADVERTISING HELD HIMSELF OUT TO THE GENERAL PUBLIC AS A PHYSICAL THERAPIST WITHOUT BEING LICENSED BY THE STATE OF MICHIGAN TO PRACTICE PHYSICAL THERAPY?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions are adequately set forth in the Petition.

MICHIGAN COMPILED LAWS

The statutes involved are adequately set forth in the Petition. However, Respondent-Plaintiff makes the following additions:

14.102

Any action at law brought by the attorney general in the name of the state or of the people of the state, for

the use and benefit thereof, may be begun in the circuit court in and for the county of Ingham, and may be prosecuted to final judgment and satisfaction thereof, with like effect as though the cause of action arose in such county. In any such case process issued out of and under the seal of said court may be served anywhere within the state of Michigan.

338.156

The license provided for in this act shall entitle the holder thereof to practice chiropractic in the state of Michigan, and for the purpose of this act chiropractic is defined as "the locating of misaligned or displaced vertebrae of the human spine, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae and surrounding bones or tissues, for the restoration and maintenance of health." A licensed doctor of chiropractic under this act may use x-ray and such analytical instruments as are approved by the Michigan board of chiropractic examiners in the examination of patients solely for the purpose of locating misaligned or displaced vertebrae of the human spine and for the procedures preparatory thereto.

The terms "chiropractic", "doctor of chiropractic", "chiropractor" and "all licensed doctors of chiropractic" mean a practitioner of chiropractic as defined in this act.

445.803

In determining whether or not advertising is deceptive or misleading, there shall be taken into account, in addition to the above, the extent to which the advertising fails to reveal facts material in the light of representations made or suggested in a positive manner.

445.807

(1) The attorney general may maintain an action to enjoin a continuance of any act in violation of this act. If the court finds that the defendant is violating or has violated any of the provisions of this act, it shall enjoin him from a continuance thereof. It shall not be necessary that actual damages to any person be alleged or proved.

(2) No proceeding shall be instituted for an injunction unless the attorney general has notified the defendant of his intention to file such a proceeding unless the defendant ceases and desists or has taken positive action to cease and desist from continuing to act in violation of this act, which notice shall be given at least 48 hours previous to the filing of the action. No injunction shall issue if defendant has ceased or has taken positive action to cease and desist violating the provisions of this act, upon receipt of the notice.

STATEMENT OF THE CASE

Charles F. Atwell, D.C., hereinafter referred to as Petitioner-Defendant, is a duly licensed chiropractic physician under 1933 PA 145, as amended; MCLA 338.151 *et seq*; MSA 14.591 *et seq*. Frank J. Kelley, Respondent-Plaintiff, hereinafter referred to as Attorney General, is the Attorney General of the State of Michigan and as such, serves as the chief law enforcement officer of the state.

On February 19, 1971 the Attorney General pursuant to section 7(2) of 1966 PA 241, as amended; MCLA 445.801 *et seq;* MSA 19.853(1) *et seq*, hereinafter referred to as Deceptive Advertising Act, instituted an action in the Circuit Court for the County of Ingham, State of Michigan, to restrain

Petitioner-Defendant from holding himself out to the public as a physical therapist through the medium of advertising in the Yellow Pages directories in the Detroit metropolitan area. The offending ad was placed under the heading "Physical Therapists" and, as an example, reads as follows:

"Atwell Zone Physiotherapy
& Fx Massage System
15412 E. Warren, Detroit

Physical therapists
Massage
Chiropractic physicians."

Pursuant to an Order to Show Cause, preliminary injunctive relief was granted to the Attorney General on May 21, 1971.

Petitioner-Defendant thereafter on or about July 1, 1971 instituted an action in the United States District Court for the Eastern District of Michigan, Southern Division, against Frank J. Kelley, Attorney General, Gay S. Hardy, Assistant Attorney General, and Donald L. Reisig, Ingham County Circuit Judge, alleging these defendants under color of state law participated in a deprivation of Defendant-Appellant's federally guaranteed civil rights. This action was dismissed on October 19, 1971 by the Honorable Damon J. Keith.

Thereafter, Petitioner-Defendant took an appeal to the United States Court of Appeals for the Sixth Circuit resulting in affirmance of the District Court. Petitioner-Defendant's Petition for Writ of Certiorari to the United States Supreme Court was denied.

Subsequent to the resolution of the federal cases, the Attorney General moved for summary judgment in the original

Ingham Circuit case. On January 18, 1974 the order herein appealed from was entered which provides in pertinent part as follows:

> "IT IS FURTHER ORDERED that defendant, Charles F. Atwell, D.C., shall be and hereby is permanently restrained and enjoined from advertising by using in connection with his name the words or letters 'physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T.,' or any other letters, words or insignia indicating or implying that he is a physical therapist, or in any other way, orally, in print, by sign, directly or by implication, representing himself as a physical therapist, in publications, including the Yellow Pages issued by the Michigan Bell Telephone directory placed before the public."

Petitioner-Defendant then appealed the Circuit Court decision to the Michigan Court of Appeals. The Michigan Court of Appeals upheld the decision of the Circuit Court in favor of the Respondent-Plaintiff reported at 59 Mich App 219; NW2d ..... (1975). Subsequently, Petitioner-Defendant sought leave to appeal to the Michigan Supreme Court. Leave to appeal was denied by the Michigan Supreme Court on July 9, 1975 in case number 56800.

ARGUMENT

I.

PETITIONER-DEFENDANT WAS NOT PLACED TWICE IN JEOPARDY BY THE ACTION OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN TO ENJOIN PETITIONER-DEFENDANT'S DECEPTIVE ADVERTISING.

The Attorney General, pursuant to the authority of section 7(2) of the Deceptive Advertising Act, *supra*, served the required Cease and Desist Order upon Petitioner-Defendant. Subsequently, after Petitioner-Defendant's failure to take positive action pursuant to the Order, the Attorney General instituted proceedings in the Circuit Court for the County of Ingham, State of Michigan.

The Deceptive Advertising Act, *supra*, reads in pertinent part as follows:

> "It shall be unlawful for any person knowingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive or misleading; or to advertise the availability of goods, wares or merchandise so as to misrepresent or unreasonably overstate the available supply in relation to reasonably expectable public demand, unless the advertisement discloses a limitation of quantity." MCLA 445.801; MSA 19.853(1)

> "In determining whether or not advertising is deceptive or misleading, there shall be taken into account, in addition to the above, the extent to which the advertising fails to reveal facts material in the light of representations

made or suggested in a positive manner." MCLA 445.803; MSA 19.853(3)

"(1) The attorney general may maintain an action to enjoin a continuance of any act in violation of this act. If the court finds that the defendant is violating or has violated any of the provisions of this act, it shall enjoin him from a continuance thereof. It shall not be necessary that actual damages to any person be alleged or proved.

"(2) No proceeding shall be instituted for an injunction unless the attorney general has notified the defendant of his intention to file such a proceeding unless the defendant ceases and desists or has taken positive action to cease and desist from continuing to act in violation of this act, which notice shall be given at least 48 hours previous to the filing of the action. No injunction shall issue if defendant has ceased or has taken positive action to cease and desist violating the provisions of this act, upon receipt of the notice." MCLA 445.807; MSA 19.853(7)

Petitioner-Defendant's representations of being a physical therapist are untrue since he is not licensed as such. Petitioner-Defendant's advertising represents in a positive manner that he is a physical therapist and provides services clearly within the ambit of the practice of physical therapy; the ads do not disclose the license status of Petitioner-Defendant. Clearly, offering physical therapy (physiotherapy) services falls within those proscribed activities contained in section 15 of the Physical Therapy Act, 1965 PA 164, as amended; MCLA 338.321 *et seq;* MSA 14.715(1) *et seq.*

The purpose of the Deceptive Advertising Act, *supra,* is to protect the citizens of the State of Michigan from those who

would use the persuasive media of advertising to offer services they may or may not be legally able to offer.

Petitioner-Defendant is before this Court raising the argument of double jeopardy and submits to this Court what appears to be portions of prior briefs filed in the federal actions. Somehow, Petitioner-Defendant seems to be convinced that the injunctive action under the Deceptive Advertising Act, *supra,* is criminal in nature. Petitioner-Defendant must be contending that since in 1969 he received an order from the Circuit Court for the County of Wayne, State of Michigan, mandating Michigan Bell Telephone Company to place his ads, the Attorney General's action in the instant matter constitutes double jeopardy. It is clear that the constitutional doctrine prohibiting double jeopardy applies to criminal actions. Moreover, the order on which Petitioner-Defendant relies does not speak to the Attorney General or any state agency.

Petitioner-Defendant further claims that the Circuit Court for the County of Ingham, State of Michigan, lacked jurisdiction over him and that its judgment reverses the order of Thomas Roumell, Circuit Judge for the County of Wayne, State of Michigan.

The Attorney General is authorized by statute to institute actions in the Circuit Court for the County of Ingham, State of Michigan:

"Any action at law brought by the attorney general in the name of the state or of the people of the state, for the use and benefit thereof, may be begun in the circuit court in and for the county of Ingham, and may be prosecuted to final judgment and satisfaction thereof, with like effect as though the cause of action arose in such county. In any such case process issued out of and under the seal

of said court may be served anywhere within the state of Michigan." 1919 PA 232, § 2; MCLA 14.102; MSA 3.212

Petitioner-Defendant erroneously claims his actions against Michigan Bell Telephone Company preclude the Ingham County Circuit Court from preventing him from placing the ad.

Petitioner-Defendant's claim is specious and without merit. The circuit court order to which Petitioner-Defendant refers was a mandatory injunction issued by Judge Roumell, Wayne County Circuit Judge, directing the Defendant Michigan Bell Telephone Company to place the advertising of Charles F. Atwell, D.C. in the Detroit classified telephone directory under the heading "Physical Therapist." The State of Michigan was not a party to this suit and received no notice thereof prior to the issuance of the aforementioned mandatory injunction. Not being a party to the litigation, the state is not bound by the terms of Judge Roumell's order.

The Court's attention is respectfully directed to *Old Kent Bank & Trust Co* v *United States*, 362 F2d 444, 450 (1966), decided by the United States Court of Appeals, 6th Circuit, which stated:

> "The opinions of the Probate Courts and Circuit Courts of Michigan are not digested, published or made available to the bench and bar, *are binding only on the parties to the particular cases and do not constitute binding precedents in the other courts of Michigan. . . .*" (emphasis added)

See also *Dowell* v *Gardner*, 386 F2d 809, 810 (CA 6, 1967).

The Attorney General therefore submits as to this issue that Petitioner-Defendant is not entitled to the relief he seeks.

ARGUMENT

II.

PETITIONER-DEFENDANT THROUGH HIS ADVERTISING HAS HELD HIMSELF OUT TO THE GENERAL PUBLIC AS A "PHYSICAL THERAPIST" WITHOUT BEING LICENSED BY THE STATE OF MICHIGAN TO PRACTICE PHYSICAL THERAPY.

Petitioner-Defendant contends that the Attorney General's action pursuant to the Deceptive Advertising Act, *supra*, was unfounded. The Attorney General instituted an action in the Circuit Court for the County of Ingham, State of Michigan, to restrain Petitioner-Defendant from holding himself out to the public as a physical therapist through the medium of advertising in the Michigan Bell Telephone Yellow Pages directories in the Detroit metropolitan area. The offending ad was placed under the heading "Physical Therapists" and, as an example, reads as follows:

> "Atwell Zone Physiotherapy
> & Fx Massage System
> 15412 E. Warren, Detroit
>
> Physical therapists
> Massage
> Chiropractic physicians."

The Physical Therapy Act, *supra*, defines the practice as:

"Sec. 1. As used in this act:

"(a) 'Physical therapy' or 'physiotherapy' means the treatment of any bodily or mental disorder of any person,

> or the prevention of such disorder, by the use of the physical, chemical and other properties of heat or cold, air, light, water, electricity, sound, massage, mechanical devices and therapeutic exercise, including related rehabilitation procedures. The use of Roentgen rays and radium for diagnostic or therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term physical therapy or physiotherapy." MCLA 338.321; MSA 14.715(1)

The use of certain titles is proscribed by section 15 of the Physical Therapy Act, *supra*, which reads as follows:

> "A person who is not registered under this act as a physical therapist or whose registration has been suspended or revoked, or whose registration has lapsed and has not been renewed, who uses in connection with his name the words or letters physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T., or any other letters, words or insignia indicating or implying that he is a physical therapist, or who in any other way, orally, in print, by sign, directly or by implication, represents himself as a physical therapist, is guilty of a misdemeanor. The prosecuting attorney may petition the circuit court for an injunction prohibiting violations of this section. This section takes effect 1 year after the effective date of this act." MCLA 338.335; MSA 14.715(15)

A comparison of the proscribed terms and Petitioner-Defendant's advertising reproduced above indicates a holding out to the general public in clear violation of the statute.

It is the Attorney General's contention in order to protect the health, safety and welfare of the people of this state that

Petitioner-Defendant be enjoined against representing himself as a physical therapist when he is not licensed to practice that health care occupation, as is required under the law of the State of Michigan.

It has long been recognized that a state, under its police power, may regulate the practice of professional and auxiliary activities concerning the public health. The state in its sovereign capacity is vested within its police powers to conserve and protect the public health. The United States Supreme Court has recognized this principle on numerous occasions, upholding a state's exercise of its police power in regulating various health care professions and occupations. *Williamson* v *Lee Optical of Oklahoma*, 348 US 483; 99 L Ed 563; 75 S Ct 461 (1955). *North Dakota State Board of Pharmacy* v *Snyder's Drug Stores*, 414 US 156; 38 L Ed 2d 379; 94 S Ct 407 (1973). *Semler* v *Oregon State Board of Dental Examiners*, 294 US 608; 79 L Ed 1086, 1089; 55 S Ct 570 (1934):

> "The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. . . . The State may thus afford protection against ignorance, incapacity and imposition. . . . We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals . . . and that it may prohibit advertising that tends to mislead the public in this respect. . . ." (p 1089)

On the strength of the above authority, the legislature's

regulation of the occupation of physical therapy is clearly a valid exercise of the police power.

The scope of chiropractic practice as defined in 1933 PA 145, *supra*, is:

> "Sec. 6. . . . for the purpose of this act chiropractic is defined as 'the locating of misaligned or displaced vertebrae of the human spine, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae and surrounding bones or tissues, for the restoration and maintenance of health.' . . ." MCLA 338.156; MSA 14.596

While it is possible some procedures that may be within the scope of chiropractic practice are also within the practice of physical therapy, neither statute would allow Petitioner-Defendant to advertise and hold himself out as a physical therapist.

CONCLUSION

The Attorney General, invoking his statutorily granted authority, instituted an action for injunctive relief to prevent the proliferation of Petitioner-Defendant's deceptive and misleading advertising as a physical therapist. The Circuit Court of Ingham County perceptively saw the relatively simple issues involved and correctly issued the appropriate injunctive order, which does not prevent Petitioner-Defendant from plying those parts of his trade as a chiropractor that overlap with the function of a physical therapist. The prohibition is against the holding out of Petitioner-Defendant of himself as something he is not.

The public responding to Petitioner-Defendant's ads faces

a needless hazard; i.e., a registered physical therapist performs his function pursuant to prescription only and is subject to disciplinary action if he deviates from the prescribed course of treatment. An unknowing layman responding to Petitioner-Defendant's ad may not receive the prescribed course of treatment ordered by his health care practitioner since Petitioner-Defendant, as a chiropractor, may deem a course of treatment under his philosophical base more appropriate.

PRAYER

WHEREFORE, the Attorney General prays that Petitioner-Defendant's Writ for Certiorari be denied.

Respectfully submitted,

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